Supreme Court, U.S.
FILED
JUN 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1775

IN THE

Supreme Court of the United States

October Term, 1987

AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA,

Petitioner,

v.

ATLANTIC PERMANENT FEDERAL SAVINGS & LOAN ASSOCIATION,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Of Counsel:
John B. McCammon
(Counsel of Record)
Edward E. Nicholas, III
Mary Ann Link
Wright, Robinson, McCammon,
Osthimer & Tatum
629 East Main Street
Richmond, VA 23219
(804) 783-1100

Attorneys for Petitioner, American Casualty Company of Reading, Pennsylvania

APPELLATE PRINTING SERVICES INC HERITAGE BLDG RICHMOND VA (804) 643-7789

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.	ii
ARGUMENT.	1
CONCLUSION.	8

TABLE OF AUTHORITIES

CASES:	Page
Ferebee v. Chevron Chemical Co., 736 F.2d 1529 (D.C. Cir.), cert. denied, 469 U.S. 1062 (1984).	7
Maryland v. Louisiana, 451 U.S. 725 (1981).	7
FEDERAL REGULATIONS:	
12 C.F.R. { 545.2.	5, 6
12 C.F.R. { 545.121.	1, 3, 6
12 C.F.R. { 563.43(d).	3

ARGUMENT

I. INTRODUCTION

This reply brief addresses several arguments raised in respondent's brief in opposition but not addressed in the petition.[1]

II. THE FHLBB LETTER IS IRRELEVANT

Respondent admits that it did not comply with the requirements of 12 C.F.R. § 545.121 when it indemnified its directors and officers for expenses relating to the underlying litigation. Brief in Opp., p. 7. However, respondent argues that its unlawful action was "sanctioned" by the Federal Home Loan Bank Board ("FHLBB") and that this alleged sanctioning brought

---

[1] Pursuant to Rule 28.1 petitioner listed all of its parent corporations, subsidiaries (except wholly owned subsidiaries) and affiliates in its Petition for Writ of Certiorari.

respondent's action into compliance with the requirements of the directors' and officers' liability policy ("the Policy"). Id., pp. 7-8. This argument is based on an after-the-fact letter from an FHLBB Supervisory Agent. Brief in Opp., Appendix, p. 1-2.

Respondent's argument mischaracterizes the FHLBB letter and misapprehends the language of the Policy and the decision of the Court of Appeals. The letter in no way sanctions respondent's regulatory violations.[2] The FHLBB's letter merely acknowledges receipt of respondent's belated indemnification resolution and states that the FHLBB has not and will not "raise any objection to that

---

[2] The Court of Appeals' opinion reviews respondent's failure to comply the FHLBB's indemnification regulations. Petition, Appendix pp. 14a-15a, fn.5.

indemnification under Section 545.121. . . ." Brief in Opp., Appendix at p. 2. The letter does not state that respondent's indemnification complied with FHLBB procedure. Nor did the letter say that the regulatory requirements did not apply to respondent due to regulatory waiver or any other reason. Indeed, respondent never asked the FHLBB to waive its indemnification procedures.[3]

The FHLBB letter constitutes no more or less than an announcement that the FHLBB did not intend to commence a regulatory proceeding to enforce the

---

[3] 12 C.F.R. § 545.121 does not contain a waiver provision. To the contrary, the indemnification portion of § 545.121 makes it clear that there is only one permissible way for federal savings and loans to indemnify their directors and officers. By contrast, other portions of the FHLBB regulatory scheme do include waiver provisions. See e.g. 12 C.F.R. § 563.43(d).

indemnification regulations. The letter did not and could not change the law regarding the indemnification by federal savings and loans of their directors and officers.

Respondent's "regulatory sanction" argument concludes by asserting that the regulations were not written for the benefit of insurers. This apparent truth is irrelevant though, where an insurer has adopted a regulatory requirement as a prerequisite to recovery under its policy. This is the case here. American Casualty's policy expressly limits recovery by respondent to those losses "for which [it] is required to indemnify or for which [it] has, to the extent permitted by law indemnified the Directors and Officers." Petition, Appendix at p. 15a (emphasis supplied by Court of Appeals for the Fourth Circuit). The FHLBB's letter to

respondent altered neither the boundaries of the law relating to indemnification by respondent of its directors and officers nor the contractual prerequisite for recovering under the Policy. Respondent was not permitted by law to indemnify its directors and officers as it did. Since the policy adopts the regulatory standard, respondent is not entitled to recovery under the policy.

III. **THE PREEMPTION ISSUE**

Respondent's final argument focuses on the real issue in this case: federal preemption. Respondent argues that the preemption provision in 12 C.F.R. § 545.2 is "relatively narrow" and preempts only conflicting "state statutes expressly undertaking to regulate Federal associations." Brief in Opp., pp. 8-9. In so arguing respondent focuses on the phrase "purporting to address" in 12 C.F.R.

§ 545.2 and ignores the phrase "all aspects of the operations of Federal associations" in the prior sentence of the section. Read together, the two sentences of the preemption provision indicate the breadth of the FHLBB's regulatory scheme and refutes the argument that only state statutory law is affected by the regulations.

Respondent's argument also ignores 12 C.F.R. § 545.121(c) and (f) which unequivocally state that the indemnification regulations set forth the only way by which federal associations may indemnify directors and officers. Thus, contrary to respondent's assertion (Brief in Opp., p. 13) the FHLBB regulations directly address the very substance of the dispute between

the parties.[4] These provisions leave no doubt as to the FHLBB's intent to preempt all conflicting state law, including application of the principle of subrogation as a method of circumventing the regulatory requirements for indemnifying directors and officers.

Citing Maryland v. Louisiana, 451 U.S. 725 (1981), respondent relies on the presumption against displacement of state law by federal law. Brief in Opp., p. 13. However, as this Court pointed out in Maryland v. Louisiana, this presumption may be overcome even without an express preemption provision. Id. at 746. Where,

---

[4] Ferebee v. Chevron Chemical Co., 736 F.2d 1529 (D.C. Cir.), cert. denied, 469 U.S. 1062 (1984), does not support respondent's argument because the preemption provision at issue there was expressly limited to labeling requirements and the state laws at issue related to wrongful death actions.

as here, the pertinent regulations expressly provide for preemption of state law, the presumption is irrelevant.

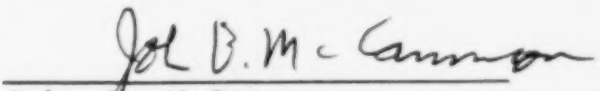
The FHLBB has provided specific procedures for the indemnification of association officers and directors; these procedures may not be circumvented through reliance on a contrary principle of state common law for the convenience of a party which has failed to comply with explicit regulatory requirements.

CONCLUSION

For the reasons stated in the petition and in this reply brief, petitioner

asks that the requested writ be granted.

Respectfully submitted,



John B. McCammon
(Counsel of Record)

Edward E. Nicholas, III
Mary Ann Link
Wright, Robinson, McCammon,
Osthimer & Tatum
629 E. Main Street
Suite 400
Richmond, VA 23219
(804) 783-1100

Dated June 2d, 1988

APPENDIX

12 C.F.R. § 563.43(d)

> **Waiver.** The restrictions in paragraph (b) and (c) of this section may be waived by the Board in supervisory cases if the Board determines that the terms of the transaction in question are fair to, and in the best interests of, the insured institution or subsidiary. A supervisory case includes a merger instituted for supervisory reasons, and action taken pursuant to, or in order to obviate the necessity of, proceedings by the Board or the Corporation pursuant to paragraph (d) of section 5 of the Home Owners' Loan Act of 1933, as amended (12 U.S.C. 1464(d)), or section 407 of the National Housing Act, as amended (12 U.S.C. 1730).